Filed 3/26/12 In re L.D. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re L.D., Jr., a Person Coming Under the Juvenile Court Law.	B234418 (Los Angeles County Super. Ct. No. CK84153)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.D., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Terry Truong, Juvenile Court Referee. Affirmed.

Marsha F. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, Emery El Habiby, Deputy County Counsel, for Plaintiff and Respondent.

No appearance on behalf of Minor.

* * * * * *

Appellant L.D. (Father) appeals from the juvenile court's jurisdiction order sustaining a dependency petition pursuant to Welfare and Institutions Code section 300, subdivision (b)[1] and a disposition order declaring the child L.D., Jr. (L.D.) a dependent of the court and releasing him to his parents' custody with family maintenance services. We affirm. Substantial evidence supported both the juvenile court's jurisdictional findings and disposition order, and the juvenile court did not abuse its discretion by failing to consider an alternative disposition.

FACTUAL AND PROCEDURAL BACKGROUND

Detention.

On September 17, 2010, the Los Angeles County Department of Children and Family Services (Department) received a referral that 11-month-old L.D. was being treated at a hospital emergency room for a fever, and X-rays revealed multiple old fractures along the left side of his ribcage. The Department social worker interviewed the hospital social worker, who indicated that X-rays had been taken because of L.D.'s persistent fever and congestion. She further stated that L.D.'s parents, Father and W.L. (Mother) were unaware of any incidents that could have caused the injuries, appeared attentive to and concerned about L.D. and cooperated with hospital personnel. L.D. appeared comfortable with his parents and did not appear to be in any pain associated with his ribs.

L.D.'s attending physician, Dr. Wilfred Idsten, confirmed that X-rays showed multiple old fractures on five of L.D.'s ribs on his left side. Dr. Idsten could not opine on whether there were concerns of abuse. He stated, however, that his findings were uncommon and he could only speculate that injuries to one side of the ribcage could have been caused by a fall or squeezing.

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[1] Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

In an interview with the social worker, Mother stated that three days earlier she had taken L.D. to his pediatrician, who prescribed antibiotics and told Mother to take L.D. to the emergency room if he did not improve. She took L.D. to the emergency room in the early morning hours on September 17, 2010 because of his persistent fever and cough. He was treated and released, but Mother brought him back later that day because he was having trouble breathing. At that point, X-rays revealed the old fractures. Mother had no idea what could have caused the injury. She had never observed L.D. fall from any height, neither she nor Father hit or disciplined him, and she had never observed him in extreme pain.

Father was in disbelief about the fractures. He, too, had not seen L.D. fall down or hurt himself, and he denied ever hitting L.D. or hurting him in any way. Both Mother and Father stated that only family members care for L.D. L.D.'s maternal grandmother and her boyfriend watched L.D. a few days per week while Mother and Father were at work. The maternal grandmother and her boyfriend denied hitting L.D., seeing him fall or observing any injuries on him.

When the social worker indicated that she intended to take L.D. into protective custody, Mother and Father denied having any criminal record and stated they were good parents who would never harm their child.

After conducting some investigation the next day, the social worker learned that Father had twin daughters born in August 2002 who were taken into protective custody in June 2006. Father's reunification services were terminated in September 2007. When asked why he did not reunify with the children, Father responded that he thought the social worker was judging him and trying to paint a bad picture of him. Court records indicated that the girls' mother had left them with Father, and Father contacted the Department, stating that he no longer wanted the responsibility of caring for them and denied they were his biological children.

The investigation further showed that Father had an extensive criminal history, beginning as a juvenile. The social worker asked Father whether he was registered as a sex offender. Father stated that he was not a sex offender; when he was 13 years old a

girl was raped in his home, but he had nothing to do with the incident. He intended to seek legal assistance to clear the matter from his record. The social worker also asked about a domestic violence incident in 2005. Father denied being involved in domestic violence, stating that a former girlfriend was "crazy" and alleged that he had hit her 30 minutes before seeking a restraining order. According to Father, his probation officer vouched for the fact that Father had been with him at the time of the alleged violence.

In a September 22, 2010 addendum report, the social worker outlined a subsequent interview with Dr. Idsten, who explained that L.D. had a total of five rib fractures. Though the fractures were "old," Dr. Idsten could not date them or tell whether they all occurred at the same time. He said that the parents were totally surprised about the injuries and could not provide an explanation as to how they could have occurred. He stated the fractures could not have been caused by L.D.'s cough. When asked whether it was more likely than not that the fractures were inflicted rather than accidental, "Dr. Idsten stated, 'I am not a Child Abuse expert, but from the way they [the fractures] appear, they are probably inflicted.'" Explaining why he believed the fractures were inflicted, Dr. Idsten stated: "'Because a 10-month-old does not break ribs like that or fracture ribs like that. There were too many ribs and that is highly unusual that something like that would happen to him. I mean it could have been a fall, but that wouldn't explain so many fractures.'"

On September 22, 2010, the Department filed a dependency petition pursuant to section 300, subdivisions (a), (b) and (e). At the detention hearing the same day, the juvenile court found a prima facie case for detaining L.D. It reasoned: "And I am detaining because I have a big question mark as to exactly what happened. I don't know whether this is one incident where five ribs were broken. I don't know whether it occurred with more than one incident. I need a little more information. I need a little more medical information in order to make a better determination as to exactly what happened to this child. And until I'm able to make that determination, I do have to detain because I don't know what happened." The juvenile court vested temporary care and placement of L.D. with the Department. It declined to follow the Department's

recommendation that reunification services not be provided and, instead, suggested that Mother and Father enroll in parenting and individual counseling to demonstrate their interest in reunifying. Mother and Father received monitored visitation of four hours per week minimum.

Jurisdiction and Disposition.

The Department's October 20, 2010 jurisdiction/disposition report outlined Father's prior child welfare and criminal history. The report indicated that Father's other two children were currently in the care of their mother and receiving family maintenance services. He had not had any contact with the children in over four years. With respect to Father's rape in concert charge and subsequent sex offender registration, Father elaborated that when he was 13 years old his 15-year-old girlfriend had a party at her house and he passed out after drinking alcohol. When he awoke, he saw his brother and a friend raping the girlfriend. He helped her, and even though she testified on his behalf, he was convicted of sexual battery because he refused to implicate his brother. He still planned to appeal his registration requirement, but lacked the resources to do so.

In an October 14, 2010 interview, Mother reiterated the events preceding her taking L.D. to the hospital. She still could not explain how the fractures occurred, stating that she had never seen any bruises or bumps on L.D. and tended to take him to the doctor for every little thing. Father's statements were consistent, indicating that he never observed bruises on L.D. and the child never appeared to be in pain. A paternal aunt confirmed that she had never seen signs of injury on L.D., and that his parents loved him and took good care of him. L.D.'s maternal grandmother similarly stated she had never seen anyone hurt L.D. and added that he was not injured while in her care. The maternal grandmother's boyfriend similarly stated that he had never seen L.D. in pain or with marks on his body.

The juvenile court continued the jurisdiction/disposition hearing several times. The jurisdiction hearing commenced on May 4, 2011. Initially, the juvenile court admitted into evidence the Department's exhibits, comprised of the detention report; the jurisdiction/disposition report; L.D.'s medical records; a February 1, 2011 letter from

Dr. Kerry English; a March 21, 2011 letter from Dr. Linda Vachon; and a last minute information for the court dated May 4, 2011. After examining L.D. and reviewing his X-rays, Dr. English opined that it was unclear whether L.D. had suffered rib fractures, as "the identified areas are much more lateral than the classic rib fractures from chest compression causing inflicted rib injuries. Those tend to be posterior and much closer to the spine." Dr. Vachon had examined L.D.'s X-rays and some of his medical records, and on that basis opined it was highly unlikely that the rib fractures were due to a birth injury. In addition to attaching the two doctors' letters, the last minute information submitted by the Department attached a letter from radiologist Dr. Philip Stanley opining that the fractures appeared to be of the same age and that "[r]ib fractures without a definite history of trauma are a feature of abuse." The Department further provided Mother's and Father's completion certificates for parenting and anger management classes, as well as a progress letter confirming that they had completed 23 counseling sessions and "'demonstrated a willingness to work therapeutically on issues above and beyond the requirements of the Court.'"

Dr. Thomas Grogan, a pediatric orthopedic surgeon, testified as an expert on Father's behalf. On the basis of his review of L.D.'s X-rays, Dr. Grogan opined it was highly unlikely that L.D. had suffered a rib fracture; instead, what was depicted in the X-rays was more consistent with rib anomalies. The fact that the second rib was involved was the key to his opinion. Because of the placement of that rib, the force necessary to cause a fracture would be the equivalent of a motor vehicle accident. He also believed that the turn of the rib was more consistent with an anomaly than the manner in which a rib typically heals. Finally, the fact that only the left side showed fractures was suggestive of an anomaly, since the type of compression that likely caused the fractures would tend to cause fractures on the right side as well. When asked on cross-examination to assume there had been fractures, Dr. Grogan stated that although L.D. might have cried at the time of the fracture, he would not have had bruising, swelling or other outward signs of the injury. It would be difficult for a physician to learn of the fractures even if they were just one or two days old.

Following argument by counsel, the juvenile court took the matter under submission. Thereafter, characterizing the matter as a "battle of the experts," the juvenile court determined that it found persuasive the conclusion of the radiologists that L.D. had suffered from rib fractures. The court found Dr. Grogan's alternative explanation insufficient to refute the radiologists' findings. However, finding no evidence to support the allegations that there had been intentional and severe physical abuse, the juvenile court dismissed the counts under section 300, subdivisions (a) and (e). It found L.D. to be a person described under section 300, subdivision (b); as amended, the sustained petition provided: "On 9/17/2010, ten-month-old [L.D.] was medically examined and found to have sustained old rib fractures to the child's left second, third, fourth, fifth and sixth ribs. The child was in [Mother's and Father's] care and custody at the time. Such injuries of the child and the parents' inability to explain the injuries place the child at risk of harm."

Proceeding immediately to disposition, the juvenile court placed L.D. home with Mother and Father, over the Department's objection. It concluded that the parents had already essentially completed what it would have ordered as a case plan of parenting classes and individual counseling. The juvenile court further ordered that Mother and Father receive family maintenance services to include unannounced home calls.

Only Father appealed.

DISCUSSION

Father contends the jurisdiction order is unsupported by substantial evidence and inconsistent with a home-of-parents disposition. He further contends the juvenile court abused its discretion by failing to consider the statutory alternative of ordering informal services without adjudicating L.D. as a dependent of the court. (§ 360, subd. (b).) We disagree.

I. Substantial Evidence Supported the Juvenile Court's Jurisdictional Findings.

We review the sufficiency of the evidence to support the juvenile court's jurisdictional findings under the substantial evidence standard. (*In re E.B.* (2010) 184 Cal.App.4th 568, 574.) Pursuant to this standard, we determine whether there is any substantial evidence, contradicted or uncontradicted, to support the juvenile court's determination. (*In re Tracy Z.* (1987) 195 Cal.App.3d 107, 113.) "[W]e draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

Jurisdiction is appropriate under section 300, subdivision (b), where there is substantial evidence that "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . ." Three elements must exist for a jurisdictional finding under section 300, subdivision (b): "'(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) "serious physical harm or illness" to the minor, or a "substantial risk" of such harm or illness.' [Citation.] 'The third element "effectively requires a showing that at the time of the jurisdiction hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur). [Citations.]"'" (*In re J.O.* (2009) 178 Cal.App.4th 139, 152; see also *In re S.O.* (2002) 103 Cal.App.4th 453, 461 ["'[P]ast conduct may be probative of current conditions' if there is reason to believe that the conduct will continue"].)

Here, there was substantial evidence that L.D. had suffered serious physical harm. Three radiologists opined that he had suffered multiple severe rib fractures. They opined that it was highly unlikely the fractures were due to a birth injury; nor could they have been caused by L.D.'s cough. Rather, they concluded that such fractures would not have occurred without significant, non-accidental trauma. That Father presented conflicting medical evidence does not alter our conclusion that the Department offered substantial

evidence to show that L.D. had suffered multiple rib fractures. (E.g., *Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705 ["In the presence of substantial evidence, appellate justices are without the power to reweigh conflicting evidence and alter a dependency court determination"].)

Father contends there was insufficient evidence to establish the remaining elements necessary for a jurisdictional finding under section 300, subdivision (b). First, he argues there was no evidence to suggest that L.D.'s injuries were caused by any neglectful conduct on his or Mother's part.[2] But the evidence showed that L.D. remained in their care and custody or the care and custody of close relatives at all times. Neither Mother nor Father could offer a viable explanation as to how the injuries occurred. Though neither noticed any outward signs of injury, Father's own expert testified that L.D. would not have exhibited swelling, bruising or other outward signs of injury from the fractures. As stated in *In re J.N.* (2010) 181 Cal.App.4th 1010, 1026, "[t]he nature and circumstances of a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances." Here, that L.D.'s unexplained injuries occurred while L.D. was under the exclusive care and custody of Mother and Father was sufficient for the juvenile court to find that his injuries were caused by their neglectful conduct. Moreover, the juvenile court was entitled to question Father's credibility on the basis of his denying he had a criminal record and his inconsistent statements concerning the dependency of his twin daughters and his sex offender registration. (See *In re P.A.* (2006) 144 Cal.App.4th 1339,

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[2] Section 355.1, subdivision (a) provides: "Where the court finds, based upon competent professional evidence, that an injury, injuries, or detrimental condition sustained by a minor is of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor, that finding shall be prima facie evidence that the minor is a person described by subdivision (a), (b), or (d) of Section 300." Though it would have been appropriate for the juvenile court to apply the statutory presumption here, its failure to make specific findings under the statute precludes our reliance on the presumption. (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 200, fn. 7.)

1344 [issues of credibility are questions exclusively for the juvenile court and its determination will not be disturbed unless it exceeds the bounds of reason].)

Second, Father argues that the disposition order permitting L.D. to reside with his parents was inconsistent with the requirement for jurisdiction under section 300, subdivision (b) that the child remains at risk of future harm. Given the different considerations and the different burdens that apply at jurisdiction and disposition, we find no inconsistency. "Before the court may order a child physically removed from his or her parent, it must find, by clear and convincing evidence, that the child would be at substantial risk of harm if returned home and that there are no reasonable means by which the child can be protected without removal. [Citations.] The jurisdictional findings are prima facie evidence that the child cannot safely remain in the home. [Citation.] The parent need not be dangerous and the child need not have been actually harmed for removal to be appropriate. The focus of the statute is on averting harm to the child. [Citations.] In this regard, the court may consider the parent's past conduct as well as present circumstances. [Citation.]" (*In re Cole C.* (2009) 174 Cal.App.4th 900, 917.)

Here, the juvenile court could reasonably conclude that the Department did not meet its heightened burden to show a substantial risk of future harm by clear and convincing evidence. The juvenile court explained that Mother and Father had already voluntarily participated in the services that it would have ordered as the case plan. The evidence showed that Mother and Father had completed parenting and anger management classes and participated in more than 20 conjoint therapy sessions. According to their therapist, Mother and Father "have thoroughly processed the circumstances surrounding the removal of their son, and they express considerable concern about the injuries he sustained." While the therapist indicated that the conjoint therapy sessions had concluded, she agreed to make herself available for follow-up services in the event of reunification. Under these circumstances, the evidence showed that there were reasonable means to protect L.D. without removal. (See § 361, subd. (c)(1).) But this evidence failed to undermine the juvenile court's previous conclusion—reached under a

preponderance of the evidence standard—that L.D. remained at risk. Consistent with its jurisdictional finding, the juvenile court further ordered the Department to provide family maintenance services and to conduct unannounced home visits. We find no inconsistency in adjudicating L.D. a dependent under section 300, subdivision (b) and ordering him placed with his parents under Department supervision.

II. The Juvenile Court Did Not Abuse Its Discretion by Failing to Select an Alternative Disposition.

Section 360 provides the juvenile court with several options once it has determined that a child is a person described under section 300. Section 360, subdivision (d) provides that the juvenile court may, as here, "order and adjudge the child to be a dependent child of the court." Alternatively, subdivision (b) provides that the juvenile court "may, without adjudicating the child a dependent child of the court, order that services be provided to keep the family together and place the child and the child's parent or guardian under the supervision of the social worker for a time period consistent with Section 301." (§ 360, subd. (b).) As explained in *In re N.M.* (2011) 197 Cal.App.4th 159, 171, "[o]nce the juvenile court finds jurisdiction under section 300, it must adjudicate the child a dependent unless the severity of the case warrants nothing more than Agency's supervision of family maintenance services."

Though he failed to raise this claim below, Father contends the juvenile court should have selected the option under section 360, subdivision (b).[3] "Whether to exercise this option under section 360, subdivision (b), is a discretionary call for the juvenile court to make; it may opt to do so, but it need not. 'The court has broad discretion to determine what would best serve and protect the child's interest and to

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[3] We could conclude that Father forfeited this claim by failing to raise it before the juvenile court. (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 603 ["A party on appeal cannot successfully complain because the trial court failed to do something which it was not asked to do"].) Nonetheless, we will briefly address and reject his claim on the merits.

fashion a dispositional order in accord with this discretion.' [Citation.] As an appellate court, we cannot reverse the court's dispositional order absent a clear abuse of discretion. [Citation.] A court exceeds the limits of legal discretion if its determination is arbitrary, capricious or patently absurd. The appropriate test is whether the court exceeded the bounds of reason. [Citation.]" (*In re N.M., supra,* 197 Cal.App.4th at p. 171.)

We find no abuse of discretion. The juvenile court has broad discretion to craft a disposition that serves the child's best interests. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1179.) As in *In re N.M., supra,* 197 Cal.App.4th at page 171, the record here "supports the juvenile court's determination that formal supervision was appropriate." Though the court acknowledged that Mother and Father had made satisfactory progress in their classes and counseling, the juvenile court remained concerned about L.D.'s well-being. As the court recognized in ordering family maintenance services and home visits, a formal reunification plan offered monitoring and reporting of Mother's and Father's progress while a voluntary case plan would not. (*Ibid.*) "A primary purpose of the juvenile law is protection of the child. [Citation.]" (*Ibid.*) Here, the juvenile court properly exercised its discretion to conclude that court supervision offered the best protection for L.D.

The sole case on which Father relies is inapposite. In *In re L.A.* (2009) 180 Cal.App.4th 413, the appellate court reversed a disposition order declining to order a legal guardianship and preparation of an assessment under section 360, subdivision (a); instead the juvenile court ordered reunification services for both parents. Notwithstanding that the mother was absent and therefore unable to consent to the guardianship, the appellate court concluded: "Reading section 360, subdivision (a), as a whole, we find that the Legislature intended to authorize the juvenile court to order a legal guardianship at the disposition hearing when the custodial parent agrees to waive reunification services and that parent, the child (when appropriate), and the court agree that it is in the best interests of the child." (*In re L.A., supra,* at p. 427.) Though Father dismisses the fact that *In re L.A.* involved subdivision (a) of section 360 while he claims the juvenile court should have applied subdivision (b), the distinction is critical, as the

conclusion in *In re L.A.* turned on the unique procedural requirements involved in establishing a guardianship. It offers no basis for us to conclude the juvenile court abused its discretion in declaring L.D. a dependent of the court and ordering that he be placed at home with family maintenance services.

DISPOSITION

The juvenile court's jurisdiction and disposition orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ